



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
-----------------	-------------	----------------------	---------------------	------------------

10/699,187

11/01/2003

John Anthony Guido

UT09042003

3480

31105 7590 03/22/2007  
LAW OFFICE OF PHILIP A STEINER  
846 HIGUERA STREET  
SUITE 4  
SAN LUIS OBISPO, CA 93401

EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
--	-----------	---------------

3 MONTHS

03/22/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/699,187	<b>Applicant(s)</b> GUIDO, JOHN ANTHONY	
	<b>Examiner</b> Kelly Mahafkey	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 18 December 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-3 and 5-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 and 5-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

Art Unit: 1761

### **DETAILED ACTION**

Amendments made December 18, 2006 have been entered.

Claims 1-3 and 5-20 are pending.

### ***Drawings***

The objections to the drawings have been withdrawn in light of applicant's amendments made December 18, 2006.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-13, 15, 16, and 20 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claims 1, 8, and 20 recite "[processing] within a common processing facility". There is no support found in the originally filed specification for this limitation.

Claims 2 and 15 recite, "wherein cutting further comprises; removing one or more undesirable sections...". Although the specification, as originally filed, has support for both cutting and removing undesirable sections, the specification does not have support for the "cutting" as including the step of "removing undesirable sections". For example, the removal of juice could be accomplished by squeezing the fruit, it is not necessarily accomplished by cutting. Similarly, the removal of a stem could be accomplished by twisting or pulling, again cutting is not necessary.

Claim 10 recites, "visual characteristics is selected from the group consisting essentially of...". Although there is support in the specification for the visual characteristics "comprising" particular characteristics, there is not support in the

originally filed specification for the visual characteristics "consisting essentially of" specific characteristics.

Claim 11 recites "undesirable sections is selected from the group consisting essentially of..." Although there is support in the specification for the group of undesirable sections "comprising" particular sections, there is not support in the originally filed specification for the group of undesirable sections "consisting essentially of" specific sections.

***Claim Rejections - 35 USC § 112 2<sup>nd</sup> Paragraph***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 2, 5, 6, 8-13, 15, 16, and 19 remain rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The following 112 rejections remain:

Claims 2, 6, 8, 11, 15, and 16 recite, "*undesirable* sections". The term, "undesirable" is indefinite. It is unclear as to how and to whom the product is undesirable. Applicant argues that the term "undesirable sections" is definite because the specification (Page 6 lines 13-15 and Page 7 lines 21-23) gives examples of what said "undesirable sections" could include, however, as only examples of what the term could include are given, the metes and bounds of the term are not clear, the phrase remains indefinite.

Claims 5, 10, and 19 are unclear because they recite, "visual characteristics includes color, ripeness, size, damage, tenderness, juiciness, or aesthetic appeal". The metes and bounds of the claimed limitations are unknown as it is unclear as to how and by whom aesthetic appearance is measured.

The following 112 rejections have been withdrawn.

The 112 rejections of claims 1, 8, and 14 because of the recitation of "placing said plurality of fresh produce into a *shelf stable processing stream*" has been withdrawn in light of applicant's amendments.

The 112 rejections of claims 1-4, 6, 8, 9, 11, 14-16, and 18, because of the recitation of "fresh produce" has been withdrawn in light of applicant's arguments.

The 112 rejections of claims 2 and 16 because of the recitation of "said [removed] one or more undesirable sections" has been withdrawn in light of applicant's arguments.

The 112 rejection of claim 4 because of the recitation, "wherein determination" has been withdrawn based on applicant's amendments.

The 112 rejections of claims 4 and 8 because of the recitation of "produce is diverted is based *at least in part*" has been withdrawn based on applicant's amendments.

The 112 rejection of claims 4, 8, and 18 because of the recitation of "visual characteristics has been withdrawn in light of applicant's arguments.

The 112 rejection of claims 8 and 15 because of the recitation, "reintroducing *at least said* removed undesirable sections..." has been withdrawn in light of applicant's amendments.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 103(a) rejection of claims 1-6 and 8-11 over Cruess (Commercial Fruit and Vegetable Products, 3<sup>rd</sup> Edition, 1948) in view of Bettencourt et al. (US 3986561) has been withdrawn as a result of applicant's amendments made December 18, 2006.

The 103(a) rejection of claims 7 and 12-19 over Cruess (Commercial Fruit and Vegetable Products, 3<sup>rd</sup> Edition, 1948) in view of Bettencourt et al. (US 3986561) further in view of Floyd et al. (US 5505950) has been withdrawn as a result of applicant's amendments made December 18, 2006.

Art Unit: 1761

The 103(a) rejection of claim 14 over Flyod et al (US 5505950) in view of Bettencourt et al (US 3986561) has been withdrawn in light of applicant's amendments made December 18, 2006.

Claims 1-3 and 5-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Verhaeghe (US 2002/0170398 A1) in view of the combination of Sanders et al (US 6213302 B1) and Bettencourt et al (US 3986561).

Verhaeghe teaches a shelf stable processing stream for the packaging of fresh cut tomatoes comprising:

- Obtaining fresh tomatoes,
- cutting the tomatoes in a fresh cut process,
- removing the tomato tops and ends (i.e. undesirable sections),
- depositing the cut tomato middle (i.e. the tomato without the undesirable sections)

into one or more containers, and

- further processing the undesirable sections in the shelf stable process.

Refer specifically to Abstract and Paragraphs 0016, 0017, 00190030, 0035, 0040, and 0043. Note: Since Verhaeghe teaches of processing without special conditions (i.e. refrigeration, ect), one of ordinary skill in the art at the time the invention was made would expect the processing as taught by Verhaeghe to be shelf stable. Additionally, since Verhaeghe teaches of a fresh cut process for tomatoes that is a shelf stable process, Verhaeghe teaches of consolidating a shelf stable process with a fresh cut process in a common facility.

Verhaeghe, however, is silent to the method used to collect or obtain the tomatoes utilized for slicing (i.e. including harvesting the tomatoes and visually selecting the tomatoes for processing) as recited in claims 1, 5, 8, 10, 14, 18, and 19, and to the type of container used to package the tomatoes (i.e. including a modified atmosphere package with a transparent lid) as recited in claims 7, 12, 13, 14, and 17.

Regarding a method for collecting the tomatoes utilized for slicing, including harvesting the tomatoes and visually selecting the tomatoes for processing, Verhaeghe teaches of utilizing tomatoes, however is silent to the method for collecting the

Art Unit: 1761

tomatoes, thus one of ordinary skill in the art would have been motivated to look to the tomato harvesting art, such as Bettencourt, to determine a method for collecting the tomatoes as disclosed by Verhaeghe. Bettencourt discloses an improved tomato harvesting system. Bettencourt discloses that the tomatoes are mechanically harvested, visually sorted by ripeness, and then transported for distribution to a cannery or other processing facility. Bettencourt teaches that mechanically harvesting tomatoes allows more work to be done by less people, thus saving money. Refer specifically to Abstract, Column 1 lines 5-15, and Column 3 lines 32-57. Verhaeghe teaches of utilizing tomatoes, however is silent to the method for collecting the tomatoes, thus one of ordinary skill in the art would have been motivated to look to the tomato harvesting art, such as Bettencourt, to determine a method for collecting the tomatoes as disclosed by Verhaeghe. One would have been further motivated to mechanically harvest and visually sort the tomatoes in the shelf stable process as taught by Verhaeghe in order to ensure the final product was ripe, undamaged, and collected in a financially savvy method.

Regarding the type of container used to package the tomatoes, including a modified atmosphere package with a transparent lid, Verhaeghe teaches of packaging the middle of sliced tomatoes, however is silent to the type of packaging used for such a process, thus one of ordinary skill in the art would have been motivated to look to the tomato packaging art to determine the type of container to utilize to package the tomato products as disclosed by Verhaeghe. Sanders et al. (Sanders) discloses of a tray for packaging sliced tomatoes. Sanders teaches that the tomato container is a modified atmospheric package with a transparent lid. Sanders teaches that the container provides an improved method for packaging and preserving sliced tomatoes in a fresh condition. Refer specifically to Column 1 line 58 through Column 2 line 5, Column 2 lines 24-28 and 43-63, and Column 3 lines 50-67. Verhaeghe teaches of packaging a sliced tomato, however does not teach of specific package for doing so, therefore one of ordinary skill in the art would have been motivated to look to the tomato packaging art, such as Sanders, for a known package for tomatoes. One would have been further

Art Unit: 1761

motivated to use the clear, modified atmosphere package as taught by Sanders, because it is an improved package for preserving sliced tomatoes in a fresh condition.

### ***Response to Arguments***

Applicant's arguments have been considered but are moot in view of the new ground(s) of rejection, as necessitated by applicant's amendments made December 18, 2006.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure

US 5616360 discloses of a method for collecting and packaging fresh cut produce comprising: harvesting the produce, placing the produce in a shelf stable process, visually selecting the produce, cutting the diverted produce, and packaging the produce in a modified atmospheric package.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

Art Unit: 1761

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Kelly Mahafkey  
Examiner  
Art Unit 1761



**KEITH HENDRICKS**  
**PRIMARY EXAMINER**